XAVIER BECERRA, State Bar No. 118517
Attorney General of California
JON S. ALLIN, State Bar No. 155069
Supervising Deputy Attorney General
JEREMY DUGGAN, State Bar No. 229854
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6008
Fax: (916) 324-5205
E-mail: Jeremy.Duggan@doj.ca.gov
Attorneys for Defendants
Diaz, Burns and Clark

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

DORA SOLARES, Plaintiff, **v.** **RALPH DIAZ, et al.,** Defendants.	Case No. 1:20-cv-00323-NONE-BAM **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Date: July 28, 2020 Judge: The Honorable Dale A. Drozd Trial Date: Not set Action Filed: 3/2/2020

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COURT RULES

INTRODUCTION

Plaintiff Dora Solares asserts that R. Diaz, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), K. Clark, the warden at California State Prison, Corcoran (Corcoran), and J. Burns, a sergeant at California State Prison, Corcoran, are liable for the death of her son, Luis Romero.

The federal claims against all Defendants should be dismissed for failure to state facts sufficient to support a claim. The first amended complaint (FAC) consists mainly of formulaic recitations of the elements of each cause of action, and does not plead facts showing that any Defendant knew of, and disregarded a serious risk to Decedent. Further, Defendants are entitled to qualified immunity as to Plaintiff's federal claims.

The FAC also fails to plead facts showing state-law liability for Defendants Clark and Diaz, who are alleged to have supervised Sergeant Burns and others. Diaz and Clark are liable only for their own conduct, and are statutorily immune from liability for injuries caused by others. The FAC does not plead any facts showing their conduct caused Decedent's injuries, and therefore fails to state a state-law claim. Plaintiff also fails to plead any recoverable damages for the state-law negligent-supervision claim.

Moreover, because the federal claims should be dismissed, the Court should decline to exercise supplemental jurisdiction over remaining state-law claims, and instead dismiss the entire matter. Lastly, Plaintiff has not joined a necessary party for these claims, namely Decedent's father. The complaint should be dismissed in its entirety.

ALLEGATIONS

Plaintiff Solares alleges as follows:

Plaintiff Solares is the mother of Decedent Luis Romero. (Pl.'s First Am. Compl. ¶ 4 (FAC), ECF No. 15.) On or about March 7, 2019, Decedent was transferred from Mule Creek State Prison to California State Prison, Corcoran. (FAC ¶ 13.) Corcoran officials, including Defendant Burns, did not follow the usual protocol before housing inmates together, and housed Romero in a cell with inmate Jaime Osuna. (*Id.*) Osuna had been convicted of a 2011 murder, and CDCR possessed documents showing he was extremely violent. (FAC ¶ 15.) Osuna had also

been charged with attempted murder based on an incident that occurred at Kern County Jail while Osuna was awaiting trial in 2011. (FAC ¶ 15.) In 2012, Osuna had found his way into another inmate's cell and stabbed that inmate. (FAC ¶ 16.) Plaintiff believes Osuna had never previously been assigned a cellmate since his CDCR commitment in 2012. (FAC ¶ 15.)

After housing Osuna and Romero together, Corcoran staff did not conduct hourly safety checks on the cell and failed to remove a bedsheet covering the cell window. (FAC ¶ 20.) On the evening of March 8, 2019, Osuna murdered Romero and dismembered Romero's body. (FAC ¶ 21.) Staff discovered the murder in the early morning of March 9, 2019. (FAC ¶ 1.)

Plaintiff claims that, as the warden at Corcoran, Clark was responsible for ensuring that proper procedures were followed, but he failed to properly supervise his subordinates, and approved the decision to house Romero and Osuna together. (FAC ¶ 19.) Further, according to Plaintiff, Defendants Clark and Diaz failed to establish a procedure to document and track inmates' agreements to be housed together, and failed to properly supervise subordinates with regard to inmates' sharing cells. (FAC ¶ 19.)

Plaintiff asserts seven causes of action against Defendants Diaz, Clark, and Burns, for: (1) Conditions of Confinement; (2) Failure to Protect Inmate; (3) Supervisory Liability; (4) Loss of Familial Relations; (5) Conspiracy to Violate Civil Rights; (6) Negligent Supervision; and (7) Wrongful Death. (FAC 10-16.) Plaintiff further asserts an eighth case of action for failure to summon medical care against unidentified Doe defendants only. (FAC 19-20.)

STANDARD ON MOTION TO DISMISS

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Dismissal is proper where the complaint does not contain enough factual allegations, when taken as true, to establish "plausible," as opposed to merely "possible" or "speculative," entitlement to relief. *Bell Atlantic Corp.*, 550 U.S. at 555. Although detailed factual allegations are not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Bell Atlantic Corp.*, 550 U.S. at 555, 557).

In evaluating a motion to dismiss under Rule 12(b)(6), a court must assume the truth of the facts presented and construe all inferences from them in the light most favorable to the nonmoving party. *Erickson*, 551 U.S. at 94. However, courts should not "supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Additionally, courts "are not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

LEGAL ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM FOR CONDITIONS OF CONFINEMENT OR FAILURE TO PROTECT.

Plaintiff's first and second causes of action are for "Conditions of Confinement" and "Failure to Protect Inmate" under the Eighth Amendment against Defendants Clark, Burns and Does 1-15. (FAC at 12-13.) The two causes of action are redundant, as both allege that Defendants failed to protect Decedent from attack by another inmate under the Eighth Amendment. *Compare* FAC ¶ 31 (asserting that Defendants were "deliberately indifferent to a substantial risk of serious harm to Decedent), *with* FAC ¶ 36 (asserting that Defendants' failure to "abate the substantial risk of serious harm" to Decedent "constituted deliberate indifference.").

To establish a constitutional violation based on a failure to protect an inmate from attacks by another inmate, a plaintiff must show: (1) that officials exposed Decedent to an objectively substantial risk of serious harm; and (2) that the officials were deliberately indifferent to that risk — that is, that they knew of the substantial risk, but disregarded it. *See Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Further, liability under § 1983 requires a showing that a defendant's personal involvement or failure to perform legally required duties caused the plaintiff's constitutionally protected rights to be violated. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

Here, Plaintiff pleads no facts showing that Defendants Burns and Clark knew of, and disregarded, a substantial risk of serious harm to Decedent. Against Burns, Plaintiffs first assert that he "chose not to follow [the] standardized administrative committee process" before housing Osuna and Decedent together. (FAC ¶ 13.) According to Plaintiff, the usual protocol was to determine whether two inmates are an appropriate fit as cellmates, then have each inmate sign forms agreeing to be celled together. (FAC ¶ 14.) The assertion that Burns ignored that protocol does not show that Burns knew of a substantial risk of serious harm to Decedent, and disregarded it. Rather it shows only that Burns did not follow the usual protocol. Moreover, the allegations do not show that there would have been a different result if the protocol were followed. Accordingly, the pleading does not show the required element of causation. *See Leer*, 844 F.2d at 633.

Plaintiff also alleges that Defendants "were on notice that Jaime Osuna posed a threat to other inmates and should not share a cell with anyone." (FAC ¶ 15.) Without factual support, those generic allegations are nothing more than a "formulaic recitation of the elements" of the cause of action. *See Twombly*, 550 U.S. at 555. That type of "naked assertion" devoid of "further factual enhancement" is insufficient to state a claim in federal court. *Id.* at 557. While Plaintiff alleges that Osuna was dangerous, and that non-defendant "CDCR" was in possession of

documents showing the danger (FAC ¶ 15), the complaint does not plead facts showing that Burns was aware of any of the documents or incidents cited. (FAC ¶¶ 15-16.)

Next, Plaintiff asserts that Burns is "one of the leaders of a gang of correctional officers at Corcoran." (FAC ¶ 18.) Those allegations have nothing to do with Decedent, and do not show that Burns knew of, and disregarded a substantial risk of serious harm to Decedent's safety.

Plaintiff then asserts that Burns "affirmatively worked to ensure that correctional officers did not conduct any night-time safety checks" on the evening of March 8, 2019. (FAC ¶ 21.) According to Plaintiff, safety checks are "supposed to occur at least every hour." (*Id.*) Again, the assertion does not show that Burns knew of, and disregarded a substantial risk of serious harm to Decedent. Rather it shows only that Burns did not follow the usual protocol.

As to Defendant Clark, the FAC alleges that he "approved" the decision to house Osuna and Decedent together. (FAC ¶ 19.) The FAC does not allege that Clark was involved in the decision regarding cell safety checks. (FAC ¶ 21.) As with Defendant Burns, the FAC does not plead facts showing that Clark knew of, and disregarded a substantial risk of serious harm to Decedent. The allegation that Clark was "on notice that Jaime Osuna posed a threat to other inmates and should not share a cell with anyone" (FAC ¶ 15) is a "formulaic recitation of the elements" of the cause of action insufficient to state a claim. *See Twombly*, 550 U.S. at 555. The allegation that Clark "approved" the housing decision does not show that Clark knew the decision would put Decedent at a substantial risk of serious harm. (*See* FAC ¶ 19.)

To state a viable § 1983 claim, Plaintiff must, "at a minimum, allege facts which demonstrate the specific acts each individual defendant did and how that individual's alleged misconduct specifically violated plaintiff's constitutional rights." *El-Shaddai v. Zamora*, No. CV 13-2327 RGK (JC), 2017 U.S. Dist. LEXIS 122680, at *19 (C.D. Cal. Aug. 3, 2017) (emphasis in original) (citing *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002)); *see also Henry A. v. Willden*, 678 F.3d 991, 1004 (9th Cir. 2012) (rejecting allegations referring only to "Defendants" as insufficiently specific). There are no facts alleged showing that Burns or Clark knew that Romero was at substantial risk of serious harm, and that they disregarded that risk. (FAC ¶¶ 1-23.) Plaintiff's generalized and conclusory allegations that Defendants "were on notice" that

Osuna should not be double-celled are insufficient to state a cognizable claim for "conditions of confinement" or failure to protect, and Plaintiff's Eighth Amendment claims should be dismissed.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR SUPERVISORY LIABILITY.

Plaintiff's third cause of action is for supervisory liability against Diaz, Clark, Burns, and Does 11-15. But under § 1983, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The Supreme Court has rejected liability on the part of supervisors for "knowledge and acquiescence" in subordinates' wrongful discriminatory acts. *Id.* at 677 ("[R]espondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument.") Supervisors may be liable for playing "an affirmative part in the alleged deprivation of constitutional rights." *Rise v. Oregon*, 59 F.3d 1556, 1563 (9th Cir. 1995) (internal quotation marks omitted). A defendant may be held liable as a supervisor under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). "The cases in which supervisors have been held liable under a failure to train/supervise theory involve conscious choices made with full knowledge that a problem existed." *Wardell v. Nollette*, No. C05–0741RSL, 2006 WL 1075220, at *3 (W.D. Wash. Apr. 20, 2006). "[A] supervisor must have knowledge of pervasive and widespread conduct posing an unreasonable risk of constitutional injury before supervisory liability can attach." *Doe v. City of San Diego*, 35 F. Supp. 3d 1214, 1228-29 (S.D. Cal. 2014).

Here, Plaintiff asserts that Defendant Burns "knew that his subordinates did not follow protocol" with regard to the call safety checks. (FAC ¶ 45.) As explained above, the alleged failure to conduct safety checks does not show that Burns knew of a substantial risk of serious harm to Decedent, and disregarded that risk. (*See supra* § I.) The additional assertion that Burns knew that that his subordinates were not performing cell checks does not change the equation. No facts are alleged showing that Burns knew of an unreasonable risk of constitutional injury,

and disregarded that risk. Accordingly, the supervisory liability claims against Burns should be dismissed.

As to Defendant Clark, the FAC makes the same allegations regarding supervisory liability as for the Eighth Amendment claim, namely that Defendant Clark "approved" the decision to house Osuna and Decedent together "thereby knowingly refusing to terminate acts of his subordinates (Burns and unidentified Does) that he knew or reasonably should have known would cause the subordinates to deprive Romero of his eighth amendment rights." (FAC ¶ 44.) Again, those assertions are simply conclusory allegations reciting the elements of the claim, and are not sufficient to defeat a motion to dismiss. *See Twombly*, 550 U.S. at 555. The allegations do not show that Clark knew of, and disregarded a serious risk to Decedent. Moreover, the FAC pleads only a single incident, and therefore fails to plead facts showing that Clark had the requisite knowledge for supervisory liability. *See City of San Diego*, 35 F. Supp. 3d at 1228-29.

The FAC further asserts that Defendants Diaz, Clark, and Burns "disregarded the known or obvious consequences that deficiencies in training correctional officers to conduct regularly-scheduled night-time cell checks . . . would cause their subordinates to violate [Decedent's] constitutional rights." (FAC ¶ 46.) But the FAC pleads no facts regarding the supposedly faulty training, Defendants' knowledge of the supposedly faulty training, and the impact of the supposedly faulty training on officers' conduct. (*See* FAC ¶¶ 1-23.) Indeed, the FAC does not plead that any Defendant knew before this incident that their subordinates were not performing cell checks, or that there was a risk of constitutional injury from their subordinates' conduct. (*Id.*) Plaintiff therefore fails to state a claim for supervisory liability. *See City of San Diego*, 35 F. Supp. 3d at 1229 ("[O]rdinarily, the plaintiff cannot satisfy his burden of proof by pointing to a single incident or isolated incidents." (internal quotation marks omitted)); *see also Henry A. v. Willden*, 678 F.3d 991, 1004 (9th Cir. 2012) (affirming dismissal of supervisory claims that did "not allege that [supervisors] had any personal knowledge of the specific constitutional violations that led to Plaintiffs' injuries, or that they had any direct responsibility to train or supervise the [subordinates accused of direct constitutional violations]").

Plaintiff fails to plead facts showing that Defendants' supervisory conduct violated Decedent's constitutional rights. The claims for supervisory liability should be dismissed.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR LOSS OF FAMILIAL RELATIONS.

Plaintiff's fourth cause of action is for loss of familial relations against all Defendants. (FAC ¶¶ 49-52.) Parents and children may assert a Fourteenth Amendment substantive due process claim if they are deprived of a liberty interest in the companionship and society of their child or parent through official conduct. *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013). Although a Fourteenth Amendment substantive due process claim is technically distinct from an Eighth Amendment claim, where the claim is predicated upon other conduct that is alleged to be unconstitutional, a finding that the other conduct was constitutional generally will preclude recovery for interference with familial relationship. *See, e.g., Gausvik v. Perez*, 392 F.3d 1006, 1008 (9th Cir. 2004). Here, Plaintiffs' Fourteenth Amendment claim is based on the assertions of constitutional violations in the first, second, and third causes of action. (FAC ¶ 50.) Accordingly, for the reasons stated above, the fourth cause of action should be dismissed as well. *See supra* §§ I-II.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR CONSPIRACY.

Plaintiff's fifth cause of action asserts a claim for conspiracy to violate civil rights under 42 U.S.C. §§ 1983, 1985, and 1988. (FAC ¶ 54.)

Section 1988 addresses the applicability of common law, as well as availability of attorneys' fees and expert fees, in certain civil actions. It does not create a separate cause of action. (*See* 42 U.S.C. § 1988.) Accordingly, Plaintiff's conspiracy claims based on §1988 should be dismissed.

A claim based on § 1985(3) must allege that defendants acted from "racial, or perhaps otherwise class-based, invidiously discriminatory animus" in conspiring to deprive plaintiff of equal protection of the laws. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *see also Toler v. Paulson*, 551 F. Supp. 2d 1039, 1048 (E.D. Cal. 2008). Plaintiff alleges no such animus, and does not allege any equal protection violation. Accordingly, Plaintiff's conspiracy claims based on § 1985 should be dismissed.

Moreover, "[a] claim under [§ 1985] must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988). Here, Plaintiff's assertions with regard to conspiracy generically recite the elements of the claim as to all Defendants, without pleading any facts as to the alleged conspiracy. (FAC ¶ 55.) Accordingly, even if a § 1985 conspiracy claim were appropriate here, Plaintiff has not pled sufficient facts to state a claim for conspiracy. *See Iqbal*, 556 U.S. at 678 (a pleading that offers only a "formulaic recitation of the elements" of a cause of action fails to state a claim).

In order to allege a conspiracy under § 1983, a plaintiff must plead facts showing "an agreement or 'meeting of the minds' to violate constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). The complaint pleads no facts showing such an agreement. Plaintiff uses the term "meeting of the minds" but only as a generic recitation of the elements of the claim. (FAC ¶ 55.) Such a "naked assertion" does not meet the requirements for proper pleading. *See Iqbal*, 556 U.S. at 678. Accordingly Plaintiff fails to plead facts sufficient to state a conspiracy claim, and the conspiracy claim should be dismissed.

Further, a conspiracy claim under § 1983 claim requires "an actual deprivation of constitutional rights." *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006). As set forth above, Plaintiff has not properly pled a constitutional violation. (*See supra* §§ I-III.) Plaintiff's conspiracy claim should be dismissed for that reason as well.

V. MOVING DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S FEDERAL CAUSES OF ACTION.

A. Legal Standard for Qualified Immunity

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbassi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (same). The rule permits officials to

undertake their responsibilities without fear that they will be held liable for damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc). Thus, qualified immunity prohibits second-guessing prison officials, even where it is plausible that the situation could have been handled differently. *See Ziglar*, 117 S. Ct. at 1866 (stating that qualified immunity gives officials "the breathing room to make reasonable but mistaken judgments"); *City and Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (quoting *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)). Qualified immunity is also intended to free government officials from the concerns of litigation, including "avoidance of disruptive discovery." *Iqbal*, 556 U.S. at 685. Because the "driving force" behind qualified immunity is a desire to ensure that insubstantial claims against government officials will be resolved before discovery, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Pearson*, 555 U.S. at 231-32.

Courts analyze qualified immunity under a two-prong test: (1) whether the alleged facts constitute a constitutional violation and (2), if so, whether the constitutional right at issue was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts may decide which of the two prongs to analyze first based on the circumstances of the case. *Pearson*, 555 U.S. at 236. "The proper inquiry focuses on whether 'it would be clear to a reasonable officer that [the defendant's] conduct was unlawful in the situation confronted' . . . or whether the state of the law [at the relevant time] gave 'fair warning' to the officials that their conduct was unconstitutional.'" *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730, 731 (2002)). To overcome qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam) (quoting *al-Kidd*, 563 U.S. at 741). Plaintiff bears the burden of demonstrating that the constitutional right in question was clearly established at the time officials acted. *May v. Baldwin*, 109 F.3d 557, 561 (9th Cir. 1997).

The right at issue must be framed specifically to appropriately assess whether it was clearly established that the alleged conduct was unconstitutional. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). The focus of the inquiry is "whether the violative nature of *particular* conduct is clearly established," and whether the unlawfulness of the official's conduct was apparent. *Ziglar*, 137 S. Ct. at 1866 (citing *Mullenix* and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis in original).

B. Defendants Are Entitled to Qualified Immunity.

Qualified immunity applies unless, given the available case law at the time, and knowing what defendant knew, every reasonable officer would have understood that the alleged act or failure to act was unconstitutional. *Horton v. City of Santa Maria*, 915 F.3d 592, 600 (9th Cir. 2019).

Here, Plaintiff alleges Defendant Diaz was the Secretary of CDCR, but does not allege facts showing that he knew that Romero and Osuna were going to be housed together, or that he knew of any danger to Romero. (FAC ¶¶ 1-23.) Accordingly, as to Diaz, to avoid qualified immunity, Plaintiff must show that it was clearly established that prison officials with no knowledge of an inmate housing situation are constitutionally required to act to prevent the risk caused by two particular inmates being housed together.

No case law clearly established such an obligation. Indeed, as stated above, it was clearly established that officials are not responsible for the acts of their subordinates of which they have no knowledge. *See Iqbal*, 556 U.S. at 676. Diaz is entitled to qualified immunity as to Plaintiff's claims.

As to Defendant Burns, Plaintiff asserts he "ignored the usual protocol" to determine to determine whether two inmates are an appropriate fit as cellmates, then have each inmate sign forms agreeing to be celled together. (FAC ¶¶ 13-14.) And as to Defendant Clark, the FAC alleges he approved that decision. But the complaint does not allege facts showing that either Burns or Clark knew of a danger to Romero. (*See* FAC ¶¶ 1-23.)

Therefore, to avoid qualified immunity as to Burns and Clark, Plaintiff must show that it was clearly established that a prison employee violates an inmate's constitutional rights when he

places that inmate in a cell with another inmate without using the usual protocol that Plaintiff alleges, despite being unaware of any danger.

Again, no case law clearly establishes that conduct is a constitutional violation. As stated above, for a deliberate indifference claim, Plaintiff must meet that subjective requirement that Defendant knew of, and disregarded, a serious risk of substantial harm. *Hearns*, 413 F.3d at 1040. In *Estate of Ford*, the Ninth circuit found an officer accused of housing two inmates together without following the proper protocol was entitled to qualified immunity because a reasonable officer "would not necessarily have suspected that celling [the inmates together] posed an excessive or intolerable risk of serious injury." *Ford v. Ramirez-Palmer (Estate of Ford)*, 301 F.3d 1043, 1052 (9th Cir. 2002). Specifically, the Ninth Circuit found "it would not be clear to a reasonable prison official when the risk of harm from double-celling psychiatric inmates with one another changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm." *Id.* at 1051. Even if the allegations in the complaint were true, it would not have been clear to every reasonable prison warden and correctional sergeant that they were violating an inmate's constitutional rights by not following the housing protocol, because they were not aware of a substantial risk of serious harm. Accordingly, Burns and Clark are entitled to qualified immunity to Plaintiff's claims.

As to Burns, the FAC also alleges that he "affirmatively worked" to ensure that nighttime safety checks were not conducted on Romero's cell. (FAC ¶ 21.) So, to avoid qualified immunity as to those allegations, Plaintiff must show that it was clearly established that a prison employee violates an inmate's constitutional rights when he does not conduct regular nighttime cell checks, despite being unaware of any danger. No case clearly establishes such a right. Indeed, the Ninth Circuit in *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1076 (9th Cir. 2016) expressly stated that a faulty cell check practice is insufficient to show a constitutional violation. Rather, "[a] plaintiff must also demonstrate that the custom or policy was adhered to with deliberate indifference." *Id.* (internal quotation marks omitted). That is, there must be a showing that Defendant knew of, and disregarded a serious risk of substantial harm. Here, no facts are pled showing Burns had such knowledge, and accordingly Burns is entitled to qualified immunity.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR NEGLIGENT SUPERVISION.

Plaintiff's sixth cause of action is for "Negligent Supervision, Training and Staffing" under Civil Code section 1714 and Government Code section 844.6(d). (FAC 18.)

Section 1714 is a general tort provision stating that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Cal. Civ. Code § 1714.) Government code section 844.6 states that "[n]othing in this section exonerates a public employee from liability for injury caused by his negligent or wrongful omission." (Cal. Gov't Code § 844.6.) The conduct Plaintiff asserts for this cause of action is that Defendants "failed to supervise" the nighttime safety check process, and "failed to impress upon their subordinates of the high-risk placement [sic]," and "failed to ensure that their subordinates conducted regular safety checks." (FAC ¶ 59.)

A. Defendants Diaz and Clark Are Immune from Plaintiff's Negligent Supervision Claim Under Government Code Section 820.8.

First, Defendants Diaz and Clark are immune from these failure-to-supervise claims under Government Code section 820.8. Under California law, state employees are not liable for injuries caused by an act or omission of a third party, but only for their own actions. (Cal. Gov't Code § 820.8.) The immunity provisions of the California Tort Claims Act (Cal. Gov't Code § 810 et seq.) generally prevail over liabilities established by other statutes. *Wright v. State of Calif.*, 122 Cal. App. 4th 659, 671 (Cal. App. 2004). Thus, direct tort liability for a public employee may not be premised on acts of subordinates or of other government employees. *Weaver By and Through Weaver v. State*, 63 Cal. App. 4th 188, 202 (Cal. App. 1998) (determining that a supervisor was immune under section 820.8 for the actions of his subordinates).

Here, Plaintiff asks the Court to find Defendants Diaz and Clark liable based on the actions of others in allegedly failing to follow rules and procedures in placing Osuna and Romero together and conducting safety checks. (FAC ¶¶ 19-21.) The FAC does not allege any actions by Clark and Diaz that caused the injuries alleged. (*See id.*) Instead the injuries were allegedly

caused by acts of their subordinates and inmate Osuna. (*See* FAC ¶ 59.) Defendants are immune from those allegations under section 820.8.

Plaintiff may argue that Government Code section 820.8 provides immunity "[e]xcept as otherwise provided by statute," and that therefore Defendants can be liable under Civil Code section 1714. However, "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." *Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal. 4th 1175, 1183 (Cal. 2003). Section 820.8 immunity applies, and Defendants are immune from Plaintiff's claims for negligent supervision.

B. Plaintiff Fails to Plead Facts Showing Negligent Supervision by Defendants Diaz and Clark.

The interpretation of Federal Rule of Civil Procedure 8 in *Twombly* governs all civil actions, including claims based on state law, in federal court. *Iqbal*, 556 U.S. at 684. To state a claim for negligent supervision, Plaintiff must plead *facts*, not merely conclusions, showing Defendants were negligent. *Id.* at 678.

Under California law, negligence is stated where a defendant is obligated to conform to a certain standard of conduct to protect others from unreasonable risks (duty); defendant fails to conform to that standard (breach of duty); there is a reasonably close connection between the defendant's conduct and the resulting injuries (proximate cause); and plaintiff suffers actual loss (damages). *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal. App. 4th 983, 994 (Cal. App. 2008)).

As to Defendant Clark, the FAC asserts that he approved his subordinates' procedurally improper decision to place Romero and Osuna together despite being "put on notice" that Osuna was violent. (FAC ¶ 19.) But the FAC does not plead facts showing that Clark knew procedures were not followed in this case, or that there was any reason for him to suspect that procedures were not being followed. (*See* FAC ¶¶ 1-23.) Instead the FAC pleads only that Clark "rubber-stamped" the decision to house Romero and Osuna together. (FAC ¶ 19.) That is insufficient to show that Clark was negligent, because Clark had a right to expect that his subordinates would act

with reasonable care, and would follow the procedure. (*See* CACI No. 411.) The negligent supervision claims against Clark should be dismissed.

The FAC further asserts that Defendants Diaz and Clark "disregarded the known or obvious consequences that deficiencies in training correctional officers to conduct regularly-scheduled night-time cell checks and enforcing the rule against sheets hung up inside a cell to obstruct views into it, and these deficiencies in night-time safety checks would cause their subordinates to violate the Romero's constitutional rights." (FAC ¶ 46.) But no facts are pled regarding the supposed training deficiency, or Diaz and Clark's knowledge of either the deficiency or any consequences of that deficiency. (*See* FAC ¶¶ 1-23.) Indeed, the FAC simply concludes that there were "deficiencies in training" without providing any facts as to Defendants' knowledge of the situation, or their supervisory conduct. (*See id.*) Such conclusory allegations are insufficient to state a claim. *See Twombly*, 550 U.S. at 555.

C. Plaintiff Fails to Plead Recoverable Damages for the Negligent Supervision Claim.

The wrongful death action under California Code of Civil Procedure section 377.60 completely occupies the field for an action brought by the heirs for their damages to the exclusion of any other action or remedy. *See Vander Lind v. Superior Court*, 146 Cal.App.3d 358, 364 (1983). Accordingly, the negligent supervision claims can be brought only on Decedent's behalf in a representative capacity by Decedent's successor in interest. *See* Cal. Code Civ. Proc. § 377.30 et seq.

California Code of Civil Procedure Section 377.34 limits damages for a successor in interest to "the loss or damage that the decedent sustained or incurred before death," and specifically precludes recovery for "damages for pain, suffering, or disfigurement." Here, Plaintiff does not seek any damages recoverable on the negligent supervision claim, instead seeking only damages for Solares's "emotional, mental and physical pain and injuries," and Romero's "pain and suffering." (Compl. ¶¶ 24.) Those damages are not recoverable under Plaintiff's sixth cause of action. Plaintiff does not seek injunctive or declaratory relief (*see*

Compl. 17), accordingly Plaintiff's sixth cause of action should be dismissed for failure to state a claim on which relief may be granted.

VII. PLAINTIFF FAILS TO STATE A CLAIM FOR WRONGFUL DEATH AGAINST DIAZ AND CLARK.

For their seventh cause of action, Plaintiff asserts wrongful death under Code of Civil Procedure section 377.60. (FAC ¶¶ 62-65.) Plaintiff asserts that Defendants Diaz and Clark "committed intentional or negligent misconduct that caused the untimely and wrongful death of Luis Romero," apparently basing that assertion on the factual allegations of previous paragraphs. (FAC ¶¶ 62-63.) For similar reasons to those stated above with regard to negligent supervision, Defendants Diaz and Clark are immune from Plaintiff's wrongful death claims, and Plaintiff fails to plead facts supporting those claims.

A. Defendants Diaz and Clark Are Immune from Plaintiff's Wrongful Death Claims Under Government Code Section 820.8.

The factual allegations against Defendants Diaz and Clark in the FAC consist of the allegation that they supervised others who did not follow protocol with regard to housing inmates together, or hourly cell checks (FAC ¶¶ 19, 21), and that Defendant Clark approved Decedent's housing assignment (FAC ¶ 19).

As stated above, Defendants are immune from liability under Government Code section 820.8. Direct tort liability for a public employee may not be premised on acts of subordinates or of other government employees. *Weaver By Weaver,* 63 Cal. App. 4th at 202. Plaintiff's state-law claims should be dismissed because Defendants are immune under section 820.8.

B. Plaintiff Fails to Plead Facts Showing Defendants Diaz and Clark Are Liable.

A cause of action for wrongful death consists of a tort (negligence or other wrongful act), the resulting death, and the damages suffered by the heirs. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1263 (Cal. App. 2006).

As stated above, the allegations do not show any breach of duty by Diaz and Clark that proximately caused Decedent's death. (*See supra* § VI.B.) The conclusory allegations the FAC

does make are insufficient to state a claim. *See Twombly*, 550 U.S. at 555. Accordingly, the FAC fails to state a claim for wrongful death, and the cause of action should be dismissed.

VIII. PLAINTIFF'S REMAINING STATE-LAW CLAIMS SHOULD BE DISMISSED.

As set forth above, all of Plaintiff's federal claims should be dismissed. (*See supra* §§ I-V.) Once all of the federal claims are dismissed, the Court should decline to exercise supplemental jurisdiction over the state-law claims, and therefore dismiss the eighth cause of action (FAC ¶¶ 66-70 (asserted only against unserved Doe defendants)), the wrongful death claim against Defendant Burns, and any other remaining state-law claims. *See* 28 U.S.C. § 1367(c)(3) (A district court may decline to exercise supplemental jurisdiction after dismissing "all claims over which it has original jurisdiction.").

IX. PLAINTIFF FAILS TO JOIN DECEDENT'S FATHER, A NECESSARY PARTY.

The California wrongful death cause of action may be asserted by a decedent's "surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession." Cal. Code. Civ. Proc. § 377.60(a). Here, Plaintiff asserts there is no surviving spouse or issue. (Solares Decl. ¶ 2, ECF No. 2-1.) Accordingly, the cause of action may be asserted by the heirs by intestate succession. *See* Cal. Code. Civ. Proc. § 377.60(a). Under California law where there is no surviving spouse or issue, the estate passes to "the decedent's parent or parents equally." Cal. Prob. Code § 6402(b).

The first amended complaint names only Solares, Decedent's mother, as a Plaintiff. (FAC ¶ 4.) According to Plaintiff, Decedent's father has never entered the United States and it is therefore not feasible to join him. (FAC ¶ 4.)

Under Federal Rule of Civil Procedure 19, a "person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined" if that person's absence would "impede the person's ability to protect [his] interest," or "leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed R. Civ. P. 19(a)(1)(B). Here, Decedent's father is subject to service of process

under Federal Rule of Civil Procedure 4(f), and his joinder will not deprive the court of subject-matter jurisdiction, as the case arises under 42 U.S.C. § 1983. (FAC ¶ 2.)

Further, Decedent's father is a necessary party under California law, and his absence would both impede his ability to protect his interest, and subject Defendants to risk of multiple or inconsistent obligations. For a section 1983 claim, survivors can assert a claim on a decedent's behalf if permitted by the law of the state. S*ee Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998.) The California wrongful death action is "joint, single, and indivisible." *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807 (Cal. App. 1997) (internal quotation marks omitted). Heirs have a "mandatory duty to join all known omitted heirs in [a] single action." *Id.* at 808. "[B]ecause the cause of action for wrongful death is one to be exercised by all the heirs . . . an action by some, but not all, of the heirs is not the action authorized under the statute." *G.M. v. Poole*, No. 2:17-cv-02415-TLN-CKD, 2019 U.S. Dist. LEXIS 156259, at *11-12 (E.D. Cal. Sep. 11, 2019). A necessary heir must be joined, not merely named as a nominal Defendant, or the case is subject to dismissal. *Id.* at *10-12; *see also Dredge Corp. v. Penny*, 338 F.2d 456, 464 (9th Cir. 1964) (If an indispensable party is not joined, "the action is subject to dismissal.").

Here, Mr. Romero Gonzalez is a known, omitted heir who should have been joined in this action. *See* Cal. Prob. Code § 6402(b). Because Plaintiff has not joined a necessary party, the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(7).

CONCLUSION

Plaintiff's complaint fails to plead facts showing that Defendants violated Decedent's constitutional rights, and the Court should decline to exercise supplemental jurisdiction over the state-law claims. Moreover, the FAC should be dismissed for failure to join a necessary party, Decedent's father. Defendants' motion to dismiss should be granted.

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Dated: June 22, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
JON S. ALLIN
Supervising Deputy Attorney General

/s/ Jeremy Duggan

JEREMY DUGGAN
Deputy Attorney General
Attorneys for Defendants
Diaz, Burns and Clark

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